THE DOCTRINE OF RES IPSA LOQUITUR AS APPLICABLE TO INJURIES TO PERSON OR PROPERTY FROM ELECTRICAL APPLIANCES NOT UNDER THE CONTROL OF THE PERSON OR CORPORATION FURNISHING THE ELECTRICITY.

ELECTRICITY, because of its tremendous unseen power and its hidden capacity to do injury, creates many interesting legal situations. Accidents caused by the escape of electricity which result in actions for damages are of almost daily occurrence. In some cases negligence on the part of the defendant, or contributory negligence on the plaintiff's part, can be proved, and these cases present no questions other than the ordinary ones of negligence. In many instances, however, it is impossible to charge the defendant with any negligent act, and, when such is the case, if the action is to be maintained at all, it must be by virtue of the doctrine of *res ipsa loquitur*. This doctrine has been defined as follows:

> "*Res ipsa loquitur* is a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, when from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control, management, or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property, or appliance which is the immediate cause of the accident or injury, had exercised usual and proper care and precaution with reference to it." [1]

When it appears that all of the appliances are under the control and supervision of defendant, the rule is well settled that the doctrine is applicable, and the power company or person furnishing electricity must rebut the presumption of negligence which the occurrence of the accident creates.[2] A different situation is presented, however, where the electric current escapes

[1] Boyd *v.* Portland Electric Co., 41 Ore. 336, 342, 68 Pac. 810, 812.
[2] See 15 Cyc. p. 478, n. 70, for cases from the different states.

from a wire or other appliance not under the control of the defendant, although the defendant furnishes such wire or appliance with the electric current. The decisions on this question are numerous but not harmonious, and it is the purpose of this paper to discuss and analyze these cases, and, if possible, to extract some guiding principle therefrom which should govern the application of *res ipsa loquitur*. While justice demands that one operating an electric plant and furnishing electricity for consumption should use a care commensurate with the danger of the agency, still, too heavy a burden should not be placed upon such person or corporation. To hold, as some of the decisions do, that the doctrine applies even when the injury is occasioned by a wire or appliance not under the supervision of the defendant is practically to lay down the rule that producers of electricity are insurers against injuries resulting from its escape.

In England, it is held that where one maintains upon his premises a dangerous instrumentality, such as a wild animal, a high explosive, etc., he is an insurer against injuries resulting from the escape of such instrumentality.[3] This doctrine has not been accepted in the United States, and Rylands *v.* Fletcher has been repudiated by practically all of our courts.[4] Indeed, even in those jurisdictions which hold the furnisher of electricity liable, there is not an opinion which even intimates that it considers the defendant an insurer.

At the outset, and before entering into a discussion of the cases pro and con on the question, it should be stated that there is a class of decisions in the books in which it does not appear who had the control and supervision of *all* of the appliances causing the injury, and in which it is held that *res ipsa loquitur* is applicable.[5] Since these decisions are not germane to the point under investigation, no further reference will be made to them.

For the sake of clarity the cases will be discussed first under separate heads.

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[3] Rylands *v.* Fletcher, L. R. 3 H. L. 330.

[4] 1 Thompson on Negligence, § 796, and cases cited.

[5] Abrams *v.* City of Seattle, 60 Wash. 356, 111 Pac. 168; Bice *v.* Wheeling, etc., Co., 62 W. Va. 685, 59 S. E. 626.

CASES HOLDING DOCTRINE OF RES IPSA LOQUITUR APPLICABLE.

In Denver Consol. Electric Co. *v.* Lawrence,[6] it appeared that while the plaintiff was turning on a light in his home he received a severe shock causing the injuries sued for. The fixtures within the house belonged to, and were under the control of the plaintiff, and the defendant had no supervision over them. It was brought out in evidence that a partial examination of the fixtures had been made and showed that they were in good repair, and it was also shown that the converter box of the defendant had a defect and was removed, because unsafe, shortly after the accident. There was no further evidence as to the cause of the escape of the electricity. The court held that a verdict for the plaintiff would not be disturbed. This case would not seem to be in point on the question at hand because there was testimony tending to show that the defendant *was* negligent. Also, the jury was instructed that even if the company's appliances were imperfect plaintiff could not recover unless the defendant knew, or in the exercise of reasonable care could have known, of the defect. Under this instruction the jury found for the plaintiff, which was in effect a finding that the defendant had been negligent in not properly inspecting its own appliances. The case of National Fire Insurance Company *v.* Denver, etc., Company,[7] decided by the Court of Appeals of Colorado, prior to decision of the Supreme Court of Colorado in the Lawrence Case, and apparently in conflict with it, is not mentioned in the latter case, nor is there any reference to, or discussion of, the doctrine of *res ipsa loquitur* therein.

Augusta, etc., Company *v.* Beagles,[8] presented the following facts: Plaintiff was employed by a lumber company as electrician and was severely shocked by touching a live wire which formed a part of the interior appliances of the building, said appliances being owned and controlled by the lumber company. It was held that the doctrine of *res ipsa loquitur* governed. The evidence showed two things: first, that the socket of the light hanging from the wire which caused the injury was defective; and

[6] 31 Colo. 301, 73 Pac. 39.
[7] 16 Colo. App. 86, 23 Pac. 949.
[8] 12 Ga. App. 849, 78 S. E. 949.

second, that the primary and secondary wires of the defendant outside of the building had been allowed to come together thus sending the full current into the building. In other words, there was evidence of the plaintiff's contributory negligence and of the defendant's negligence, and the court held that it would not disturb the finding of the jury.

In Quincy, etc., Co. *v.* Schmitt,[9] plaintiff was injured while turning on an electric light, the interior appliances being under his control. The evidence showed that the wiring within the building was in good order, and the company admitted that its transformer was defective but contended that an electrical storm caused the defect. It was held that *res ipsa loquitur* was applicable. This case is clearly not in point since the real question involved was whether the electrical storm caused the defect in the transformer or whether the defect was the result of the defendant's negligence, the company contending that if the former hypothesis were correct it would not be liable. The verdict of the jury was that the company had been negligent, which, of course, could not be disturbed on appeal.

Wheeler *v.* Northern Ohio Traction Co.,[10] is a much stronger case than any of those just cited. Here the facts were that the cashier of a bank which furnished all of its interior electrical appliances was killed while turning on an electric light in the vault. The cause of the accident was unexplained. It was held that the doctrine of *res ipsa loquitur* controlled.

In Reynolds *v.* Narragansett, etc., Co.[11] under similar facts the evidence was conflicting as to whether the transformer was defective or not. The court refused to disturb a finding of the jury in favor of the plaintiff on this question of fact, holding that evidence of the faulty condition of the transformer having been introduced the doctrine of *res ipsa loquitur* applied. This case does not refer to Keefe *v.* Narragansett, etc., Co.,[12] previously decided by the same court, which will be taken up later with the cases bearing on the other side of this question.

The Kentucky courts have had this question before them several times and are probably the strongest authority on this side

[9] 123 Ill. App. 647.
[10] 27 Ohio Cir. Ct. 517.
[11] 26 R. I. 457, 59 Atl. 393.
[12] 21 R. I. 575, 43 Atl. 542.

of the controversy. They hold that a duty rests upon the electric company to see that the wires into which its electricity is sent are properly constructed and insulated. Thus says Paynter, J., speaking for the Kentucky Supreme Court:

> "The exact question submitted has not, so far as we are aware, been answered by any court of last resort. Some cases are cited by counsel, but the facts of those cases are not similar to the facts of this case. Therefore we must find some signboard along the new road, and, if we cannot so find the way to a proper conclusion, we will be forced to swing a sickle into the field of reason, and there harvest a principle which can be crystalized into a just rule to apply to cases like this one. By the machinery in use by the gas company, it produced and controlled the electricity. It is presumed to, and did, know the dangerous force it was putting in motion, and that it constantly imperiled the lives of those who passed along the streets where the wires were in use, unless they were properly swung and insulated. Knowing the dangerous character of the force it supplied, it was bound to use the care commensurate with the danger of its employment, so as to protect those who passed along the streets or places where the wires were placed. The electric current went in a continuous stream from the power house through the wires. Its flow could only be stopped by the agency at its source. That agency controlled the electric current at the furthest point from the power house as it did at the point where the wires of the street railway company connected with the generator. From the instant the force was generated, it remained under the control of the appellee. As it were, the hand that controlled the generator applied the deadly force to the body of the intestate. Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same whether the wires were owned by one or both of the companies. When one through the instrumentality of machinery can accumulate or produce such a deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasures may bring them in contact with it may do so with safety." [13]

[13] Thomas *v.* Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 154.

In the case just quoted from, two judges dissented, and in the later case of Maysville Gas Co. *v.* Thomas,[14] which was the same case as the former one, on the second appeal, the Chief Justice dissented. The latest Kentucky case, Lewis's Admr. *v.* Bowling Green, etc., Co.,[15] merely declares itself to be bound by the two previous cases without discussing the question anew. The holdings of this court practically make the electrical company an insurer although they do not say so in so many words.

Hoboken, etc., Company *v.* United, etc., Company,[16] is nearer in line with the Kentucky decisions than any other decision that has been found. This case holds that an electrical company is responsible for the safe condition of interior appliances, and if such appliances are defective it will be held liable for any injuries resulting therefrom.

The United States Supreme Court had this question before it in San Juan, etc., Company *v.* Requena,[17] and held that the doctrine of *res ipsa loquitur* was applicable, it appearing that the interior appliances causing the injury were not under the control or supervision of the electric company. It further appeared, however, that the transformer of the defendant was defective. There is no discussion in the opinion of what bearing the fact that the interior appliances were not owned or controlled by the defendant might have upon the application of the doctrine of *res ipsa loquitur* and the cases cited on page 99 of the opinion in support of the position of the court that *res ipsa loquitur* was applicable are not in point on this proposition since in those cases *all* of the appliances were under the control, management and supervision of the defendant.

Memphis, etc., Company *v.* Letson,[18] under similar facts to the ones in the preceding cases, held that the defendant was liable, but the court expressly avoided saying whether the doctrine of *res ipsa loquitur* should be held applicable or not, deeming it unnecessary since a negligent act of the defendant was

[14] 75 S. W. 1129. (Not officially reported.)
[15] 135 Ky. 611, 117 S. W. 278.
[16] 71 N. J. Law 43, 58 Atl. 1082.
[17] 224 U. S. 89.
[18] 68 C. C. A. 453, 135 Fed. 969.

proved, i. e., a cross between its primary and secondary wires outside of the building.

Hebert *v.* Hudson, etc., Company[19] presented a similar state of facts to the ones in the foregoing cases. The defendant furnished electricity to a distributing station which defendant claimed was an independent concern. It appeared, however, that "Hudson River Electric Company," the name of the defendant, was printed on the distributing stations, and the doctrine of *res ipsa loquitur* was held applicable. This fact weakens the case a great deal since it is practically a holding that the defendant and the distributing company were one and the same corporation.

CASES DENYING THE APPLICABILITY OF RES IPSA LOQUITUR.

One of the best considered cases under this heading is National Insurance Company *v.* Denver, etc., Company.[20] In this case a fire was caused by electricity escaping through the interior appliances of a building. Such appliances were shown to have been under the control and management of the owners of the building. It was held that since the accident was unexplained, and there was no proof of a negligent act on the part of the defendant, the surety companies could not recover and that the doctrine of *res ipsa loquitur* was not applicable.

In delivering the opinion of the Court, Bissell, P. J., says:

> "We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property. We do not believe any such responsibility rests on the company as to require them to advise the

[19] 70 Misc. 251, 126 N. Y. Supp. 672.
[20] 16 Colo. App. 86, 63 Pac. 949.

> persons who apply for the connection that they must see to it that the wiring is of a certain class or description, that it is insulated in a particular manner, and that there is no connection between it and the woodwork, and, failing in this, that they will be liable for any damages which may happen because of the neglect or unskillful nature of the construction. When parties wire houses, they are supposed to have it done intelligently, and to have hired competent persons for the purpose, to whom alone they must look in case the work is improperly and unskillfully done." [21]

As previously indicated, this case is not really in conflict with Denver Consol. Electric Co. *v.* Lawrence.[22] In the Lawrence case there was strong evidence of the defendant's negligence and the court merely held that the jury's finding would not be disturbed. The doctrine of National Fire Insurance Company *v.* Denver, etc., Co., is evidently regarded as the law of Colorado on the question, since it has been cited as authority against the application of *res ipsa loquitur* by the courts of Virginia, West Virginia, Tennessee, Colorado, Arkansas and Kansas, and these courts have not even referred to the Lawrence case.

In Memphis, etc., Co. *v.* Speers,[23] it appeared that a horse was killed while hitched to a post to which a high charge of electricity was communicated by means of the wiring of an electric sign, privately owned and constructed, which was furnished with electricity by the defendant. It was held prejudicial error to refuse to admit testimony as to the ownership and control of the wiring of the electric sign. The court cites Maysville Gas Co. *v.* Thomas,[24] and National Fire Insurance Company *v.* Denver, etc., Co.,[25] and expressly disapproves the holding of the Kentucky case. Thus the court says:

> "In each of these cases, the company furnishing the electric current had no interest in or dominion over the wires, the defect in which permitted the current to escape, so as to inflict the injury complained of. In the Kentucky case the

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[21] 16 Col. App. 86, 63 Pac. 949, 951.
[22] *Supra.*
[23] 113 Tenn. 83, 81 S. W. 595.
[24] *Supra.*
[25] *Supra.*

court rested its conclusion upon the dangerous nature of the agency supplied. 'Considering,' said the court, 'the dangerous character of the force produced by the gas company, there was a duty imposed on each (that is, the furnisher and receiver) to see that the wires into which it was sent were properly insulated. The danger was exactly the same, whether the wire was owned by one or both of these corporations.'

"Pressed to its legitimate conclusion, we think this argument would make an electric or a gas company an insurer against defects in appliances over which they had no control, and, to avoid liability, would impose upon them the duty of continued inspection of the wires and pipes of every customer supplied with their products. This would be a burden which no such company could bear and live; and it also would be a source of annoyance to its customers, which they would not long submit to.

"We prefer to place this court in line with that of Colorado, which holds that there is no liability when there is no control over the wires and no knowledge of the defect which was the occasion of the injury." [26]

In Byrd *v.* Pine Bluff Corp.,[27] an employee of the defendant went to a house where wiring had been installed by the owner and over which the defendant had no control and there received a shock which caused his death. It was held that no liability rested upon the defendant since the duty of maintaining and keeping in repair the wiring in the house rested upon the owner and not upon it. The court, after adopting the doctrine of National Fire Insurance Co. *v.* Denver, etc., Co.,[28] says:

"We are aware that there are authorities which tend to sustain the contrary view; but we believe it to be unjust, as well as unsound upon principle, to say that a lighting company is compelled to maintain in good repair appliances on the inside of a private building which the owner has a right to install for himself, or by some one else of his own selection, and who does, in fact install and maintain the same. An obligation on the part of the lighting company to inspect and maintain the wires and other appliances on the inside of the building necessarily excludes the

[26] 113 Tenn. 83, 81 S. W. 595, 596.
[27] 102 Ark. 631, 145 S. W. 562. [28] *Supra.*

> right of the owner to assume that responsibility himself. Of course, it would be different where the company was employed to put in the appliances and maintain them; for then there would be a continuing duty to exercise proper care to see that they were kept in safe condition. We think it is sound to hold that the owner has the right to have his own building wired, and to contract with the lighting company merely to furnish the electricity; and, under those circumstances, the company is not responsible for the condition of the wires on the inside of the building. This disposes of any contention of negligence on the part of the defendant in failing to keep the wires insulated." [29]

The recent Kansas case of Hoffman *v.* Leavenworth, etc., Company,[30] is one of the best reasoned cases in the books on this question. There it appeared that the defendant was under a contract with the government to furnish the electric current for illuminating and motor purposes in the Fort Leavenworth Military Reservation. It was held that no action could be maintained for the death caused by contact with an electric appliance on the military reservation over which the defendant had no control. The court approves National Fire Insurance Company *v.* Denver, etc., Co.;[31] Memphis, etc., Co. *v.* Speers;[32] Minneapolis, etc., Company *v.* Cronon;[33] and Fickeisen *v.* Wheeling Electric Company;[34] and rejects the doctrine of Maysville Gas Co. *v.* Thomas;[35] Lewis's Admr. *v.* Bowling Green, etc., Co.;[36] Hebert *v.* Hudson, etc., Company;[37] and Hoboken, etc., Company *v.* United, etc., Company.[38] After making an analysis of all these cases, the Court says:

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[29] 102 Ark. 631, 145 S. W. 562, 563. To the same effect, see Keefe *v.* Narragansett Electric Lighting Co., 21 R. I. 575, 43 Atl. 542, in which it is held that an action for injuries sustained from an electric light can not be maintained by a plaintiff who received the injuries while walking along the jet of the building adjoining his own by coming in contact with a wire which was owned by a tenant of such building and not by the defendant but connected with the defendant's wires.

[30] 91 Kan. 450, 138 Pac. 632.

[31] *Supra.*

[32] *Supra.*

[33] 166 Fed. 651.

[34] 67 W. Va. 335, 67 S. E. 788.

[35] *Supra.*

[36] *Supra.*

[37] *Supra.*

[38] *Supra.*

"The question of the defendant's liability is a new one in this state, and must be decided in accordance with established principles. Two of these principles are that one shall so use his own as not to injure another, and that the law demands only what is reasonable under the circumstances to avert such injury. The furnishing of electric current to distant places is a necessity of modern civic and industrial life, but it is in strict line with the dictates alike of law, morals, and humanitarianism that one who generates and sells this dangerous agency should use proper care to avoid resulting harm. When such power is simply furnished to a responsible party for use in a system of poles, wires, and appliances owned and controlled by such party, and in proper condition to receive the current safely, the furnishing party is not required to maintain inspection, or to see at its peril that such equipment is kept safe, but so long as not chargeable with knowledge of defect therein, it may justly and reasonably assume that such safety will be maintained; justly and reasonably, because the using company is presumed to act in accordance with prudence and safety until the contrary appears." [39]

The Court also refers to Rylands *v.* Fletcher, and repudiates the doctrine there announced.

Fickeisen *v.* Wheeling Electrical Co.,[40] has settled the law on this subject in West Virginia. Here the plaintiff's intestate was killed by a shock from a wire of a customer of the defendant. It was held that the doctrine of *res ipsa loquitur* was not applicable and that the defendant was not liable. The court treats the case as one of first impression in West Virginia, and in a very able opinion the court sanctions Memphis, etc., Company *v.* Speers;[41] National Fire Insurance Company *v.* Denver, etc., Company;[42] Keefe *v.* Narragansett, etc., Company;[43] Harter *v.* Colfax, etc., Company;[44] and Peters *v.* Lynchburg, etc., Company;[45] and rejects the doctrine of the Kentucky cases.[46] Under a similar state of facts, in Perry *v.* Ohio, etc.,

[39] 91 Kan. 450, 138 Pac. 632, 636.
[40] 67 W. Va. 335, 67 S. E. 788.
[41] *Supra.*
[42] *Supra.*
[43] *Supra.*
[44] 124 Iowa 500, 100 N. W. 508.
[45] 108 Va. 333, 61 S. E. 747.
[46] See Thomas *v.* Maysville Gas Co., *supra;* Maysville Gas Co. *v.* Thomas, *supra;* Lewis *v.* Bowling Green, etc., Co., *supra.*

Company,[47] the Supreme Court of West Virginia approved the doctrine of the Fickeisen case.

In Minneapolis, etc., Company *v.* Cronon,[48] it was shown that plaintiff's intestate, noticing smoke coming from a blacksmith shop, entered and tried to extinguish the fire. There was a wire hanging loose which the deceased grasped, and the electricity with which it was charged caused his death. It appeared that the defendant, under an independent contract three years previous, had done the inside wiring of the blacksmith shop and had then turned it over to the blacksmith, and that this wiring had been inspected by the city authorities and pronounced to be safe. The Circuit Court of Appeals for the Eighth Circuit held that the doctrine of *res ipsa loquitur* was not applicable, since the inside wiring of the blacksmith shop was not under the control and supervision of the defendant. In discussing Maysville Gas Company *v.* Thomas,[49] the court says:

> "No considerate authority supports this proposition. Its recognition and enforcement by the courts would impose upon the company furnishing electricity under contract with the owner of a building, who had wired it and owned and controlled the wires inside, an intolerable burden. Take such a city as Minneapolis, with perhaps 20,000 dwelling and business houses wired inside, under an independent contract. The contract of the electrical company is to furnish the required amount of electricity to light these buildings. Can the company, unbidden, enter at will the private house of the citizen and pass into its various rooms to inspect these wires every day to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work: and, as absolute insurers under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all hours and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business." [50]

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[47] 70 W. Va. 697, 74 S. E. 993.

[48] 166 Fed. 651. It is to be observed that the United States Supreme Court case, San Juan, etc., Co. *v.* Requena, *supra*, apparently over-rules this doctrine although it does not refer to the Cronon case.

[49] *Supra.*

[50] 92 C. C. A. 345, 166 Fed. 651, 655.

The Court then reviews National Fire Insurance Company *v.* Denver, etc., Company;[51] Memphis, etc., Company *v.* Speers;[52] and Keefe *v.* Narragansett, etc., Company;[53] and approves the doctrine there set out.

In Harter *v.* Colfax, etc., Co.,[54] the facts were as follows: A guest in a hotel was injured by coming in contact with an electric light wire. It was held in an action against the company furnishing the electricity that the doctrine of *res ipsa loquitur* would not apply since the electric fixtures within the hotel were not furnished nor maintained by the defendant. The court approves National, etc., Company *v.* Denver, etc., Company.[55] The case is not a very strong one, however, since the court refused to decide whether it was the duty of the defendant to inspect the interior electric appliances in the hotel, indicating this to be a very doubtful question but one over which the court would not concern itself because there was no evidence that the defendant had failed to make this inspection.

Peters *v.* Lynchburg, etc., Company[56] developed the following facts: Plaintiff was turning off an incandescent light in his kitchen when he received a shock from the electric wire which caused the injury for which he sued. It appeared that defendant had neither the ownership nor control of the electric appliances on plaintiff's premises. A demurrer to the evidence was sustained on the ground that the doctrine of *res ipsa loquitur,* on which the plaintiff was compelled to base his case, was not applicable in circumstances such as these. The Supreme Court of Appeals of Virginia, in holding that the demurrer to the evidence was properly sustained, says:

> "The doctrine rests upon the assumption that the thing which causes the injury is under the exclusive management of the defendant, and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. * * *
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> "But the doctrine of res ispa loquitur can have no application where the accident is due to a defective appliance

[51] *Supra.* [52] *Supra.* [53] *Supra.*
[54] 124 Iowa 500, 100 N. W. 508.
[55] *Supra.* [56] 108 Va. 333, 61 S. E. 745.

under the management of the plaintiff; *nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible.*" [57] (Italics ours).

Although the foregoing decisions seem to be hopelessly in conflict, it is submitted that upon carefully reading the various opinions the conflict is more apparent than real. Only in five cases has it been held that the defendant must assume the burden of being responsible for the safe condition of electrical appliances not owned by it nor under its control.[58] These cases are directly in conflict with the decisions heretofore discussed under the heading of "CASES DENYING THE APPLICABILITY OF RES IPSA LOQUITUR." In all of the other cases standing out for the application of *res ipsa loquitur* it will be found that there is evidence of some negligent act or omission on the part of defendant, and hence the doctrine was unnecessarily invoked.

Thus, although San Juan, etc., Co. *v.* Requena applies the doctrine, the following statement is found in the opinion:

"It is urged that the negligence charged in the complaint related only to the condition of the wiring inside the residence of the deceased, and therefore that the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters outside. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary, the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each

[57] 108 Va. 333, 336, 61 S. E. 745, 746.

[58] Thomas *v.* Maysville Gas Co., *supra;* Maysville Gas. Co. *v.* Thomas, *supra;* Lewis *v.* Bowling Green, etc., Co., *supra;* Hoboken *v.* United, etc., Co., *supra;* Wheeler *v.* Northern Ohio Traction Co., *supra.*

party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review." [59]

Evidently this case was tried upon the theory that the wiring inside of the building was in good order, and the only question before the court was the negligence of the defendant in maintaining its converters outside the building (the record containing evidence of such negligence). Indeed, from the cases cited on page 99 of the opinion in support of *res ipsa loquitur,* the court could not have meant to decide that this doctrine is applicable where a part of the electrical appliance causing the injury is not under the control and supervision of the defendant; for in every one of these cases it was shown that the appliance causing the injury was under the *sole* management and care of the defendant. In fact one of the authorities there cited, East End, etc., Co. *v.* Pennsylvania, etc., Co.,[60] is authority against this proposition, for Mitchell, J., in delivering the opinion of the court, says:

"The maxim, *'res ipsa loquitur,'* is itself the expression of an exception to the general rule that negligence is not to be inferred, but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute, and show not only that they were under *the exclusive control* of the defendant, but that in the ordinary course of experience no such result follows as that complained of." [61] (Italics ours).

It is believed that *res ipsa loquitur* can only be applied in such cases upon one theory, and that is that the duty of seeing

[59] 224 U. S. 89, 96.
[60] 190 Pa. St. 350, 42 Atl. 707.
[61] 190 Pa. St. 350, 42 Atl. 707, 708.

that the interior appliances are in good repair rests upon the defendant, even though the defendant may not be the owner of such apparatus nor have anything to do with its supervision or control. Logically, there can be no other theory, for how can the "thing itself speak" when a part of the instrumentality causing the injury is not owned, controlled or supervised by the defendant? The law says that where one is injured by an agency or appliance wholly under the control of a third person and the accident is one which in the ordinary course of events does not happen, a presumption of negligence on the part of said third person arises and the one injured need not prove any specific act of negligence. Clearly it would be a misapplication and a subversion of this doctrine to hold that it applied where a part of the appliance causing the injury is not controlled by such third person, unless it is also held that the duty of seeing that the part of the agency or appliance not under its control is safe and in good order devolves upon the defendant.

It is submitted that the doctrine of National Fire Insurance Company *v.* Denver; Memphis, etc., Company *v.* Speers; Byrd *v.* Pine Bluff Corp.; Hoffman *v.* Leavenworth, etc., Co.; Fickeisen *v.* Wheeling Electrical Co.; Minneapolis, etc., Company *v.* Cronon; and Peters *v.* Lynchburg, etc., Co., is the one supported not only by the weight of authority but also by the weight of reason. To impose on a person or corporation furnishing electricity to another who maintains and cares for his own electrical appliances, and over which appliances the furnisher of the current has no control, the burden of the responsibility for the good condition of such appliances would tend to discourage the sale of electricity to the owners of private buildings. Under such a rule the resident of a house could allow his electrical fixtures to get out of repair with safety, knowing that if any damage should be done to himself or his property by the escape of electricity he could hold the company liable without proving any negligence on their part. This being so, certainly no court should sanction such a principle. Let us hope that the next decade will see all of the states in line with the courts of Virginia, West Virginia, Tennessee, Colorado,

Arkansas and Kansas, enunciating the saner and more equitable rule that in the absence of proof of negligence on the part of the defendant furnishing electricity such defendant shall not be liable unless there is an agreement or statute compelling it to supervise control and repair the appliances of buildings to which it supplies electricity, and that such duty shall not be forced upon electrical companies and make them insurers.

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